ORIGINAL

UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEFORE THE HONORABLE ERIC L. FRANK, JUDGE

In Re:	) Case No. 08-10783-ELF-7
	) THE COURT'S RULING on
LEN POLICHUK,	) the MOTION to DISMISS
	) CLAIMS OBJECTIONS
Debtor.	)
	) Monday, April 26, 2010
	) Philadelphia, Pennsylvania

Appearances:

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Proceedings recorded by digital recording; transcript produced by federally-approved transcription service.

Monday, April 26, 2010 10:42 o'clock a.m.

P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning.

MR. BRESSLER: Good morning, Your Honor.

MR. GOLDIN: Good morning, Your Honor.

THE COURT: I have some parties on the phone, I guess.

MR. GIACOMETTI: Good morning, Your Honor. Harry Giacometti is on the phone, as well.

MR. GOLDIN: Ely Goldin, Your Honor.

THE COURT: All right. We'll start with the Polichuk case, which is number two on the list.

MR. BRESSLER: Good morning, Your Honor. Gary Bressler for the trustee.

MR. BOVARNICK: Robert Bovarnick on behalf of Andrew Mogilyansky.

THE COURT: When I scheduled this hearing to deliver my decision on the motion to dismiss the claims objections filed by Maria Ayzenberg, joined in by the debtor, and I'm now prepared to issue that decision.

Maria Ayzenberg, a creditor in this case, has filed objections to Claim Numbers 14 and 15. These are claims held by Andrew Mogilyansky, Number 14, and Nicholas Reinhart, Number 15.

Recently the Reinhart claim was amended to add entities Dunphy Nissan, Incorporated and S&L Trading,

Incorporated as coclaimants. The debtor has filed joinders to Maria Ayzenberg's objections to these two claims. Ayzenberg filed her objection to Mogilyansky's claim in September 2009.

Mogilyansky then filed a motion to dismiss the objection that same month primarily on the ground that only the trustee is authorized to file objections to proofs of claim. The trustee supports Mogilyansky's motion.

Hearings on the motion were continued numerous times while the parties attempted to reach a global settlement through mediation. And after that failed, pending the outcome of the debtor's motion to voluntarily dismiss the bankruptcy case, that motion, the debtor's motion to dismiss, having been denied by order dated March 1st, 2010.

Meanwhile, in February 2010 Ms. Ayzenberg filed an objection to the claim of Nicholas Reinhart, the creditor who had not been scheduled on the debtor's schedules. Ayzenberg also filed the – excuse me – the – that objection was joined by the debtor, as I mentioned earlier.

While no formal motion to dismiss the objection to the Reinhart claim has been filed, the parties agreed that the same issues that applied to the Mogilyansky claim applied to the Reinhart claim.

The hearing on Mogilyansky's motion to discuss the claims objection was concluded last Monday, April 19th. At the hearing the parties agreed to incorporate into the record the

testimony of the trustee from the hearing held previously on the debtor's motion to voluntarily dismiss this case, concluded on March 1st, 2010, as well as making part of the record an offer proof of further testimony from the trustee.

In addition, the parties agree that I could take judicial notice of items on the – on the claims docket.

Today I announce my decision. The starting point in determining whether a creditor may object to another creditor's claim is the statute. Section 502(a) states that a claim is allowed unless a party-in-interest objects. The term, "party-in-interest" ordinarily includes a creditor.

Thus the plain language of the Bankruptcy Code suggests that an unsecured creditor has the right to object to the claim of another unsecured creditor.

However, historically there has been a judicial limitation imposed on the plain language of the Code. A rule has developed that has been widely applied by almost all courts that a general creditor has no right to contest another creditor's claim unless the trustee has refused to do so and the Court, based on the appropriate findings, has granted the creditor permission to do so.

This principle was expressed in among many other cases, *Fred Rueping Leather Company versus Fort Greene National Bank*. That's a case from 1939 reported at 102 F.2d 372.

There appear to be two related rationales for this

doctrine:

The first has to do with the role of the trustee in the bankruptcy process. And at least some courts have analogized the bankruptcy estate to a trust, recognizing the role of the bankruptcy trustee as the trust representative, with sole authority to act on behalf of the trust, unless his or her conduct is arbitrary or unreasonable.

The second rationale is one of administrative convenience, that at the needs of an orderly and expeditious administration of the bankruptcy case mandate that this rule be apply.

Sometimes courts refer to the concept of avoiding the chaos that would result if all creditors could file objections to claims. Some courts express limitation set forth in this doctrine on the right of creditors to object to proofs of claim as a lack of standing to file claims objections. In my view, this is not an accurate use of the term "standing."

To the extent that the statute on its face authorizes objections by all parties in interest, the limitation that is developed is not one of standing, but rather a judicial gloss on the statute.

That said, I am convinced that this limitation is deeply rooted in bankruptcy jurisprudence, going back at least to the enactment of the Bankruptcy Act of 1898. I refer the parties to the extended discussion of this issue in the 14th

edition of *Colliers*, paragraph 57.17[2.2].

I am unaware of any textual or any other indication that Congress intended to alter past practice in enacting the Bankruptcy Code. Therefore, as the Supreme Court has instructed in *Cohen v. De La Cruz*, 523 U.S. 213, a 1998 case, as well as other decisions: In the absence of evidence in enacting the Bankruptcy Code Congress intended to alter past practice here, the limitation on the right of parties-in-interest to object to proofs of claim without court authorization. Past practice was carried forward to the Bankruptcy Code. And, in my view, *Fred Rueping*, the 1939 Third Circuit case remains good law.

So the question here is whether in this case the Court should authorize a creditor to object to a proof of claim at this time over the trustee's objection?

The real issue is, given the trustee's presumptively exclusive role in the claims objection process, what standard should the Court employ in reviewing a trustee's judgment on this question?

Surprisingly, there is only a modest amount of discussion on that issue in the case law. One of you expressed, in this District in the case of *In re Morrison*, 69 B.R. 586, a bankruptcy decision from 1987, is that the creditor must establish that the trustee abused his or her discretion in not objecting to a claim. That is the trustee must have acted unreasonably, or arbitrarily, or unjustifiably.

Other reported decisions might be read to require a lesser showing. That is, that the estate would benefit if the objection to the proof of claim was sustained or, restating this slightly, that creditors may prosecute objections to proofs of claim if permitting them to do so is in the best interest of the bankruptcy estate.

Two cases sometimes cited for this proposition are *In re Trusted Net Media Holdings, LLC*, 334 Bankruptcy Reporter 470, Bankruptcy Court, Northern District of Georgia 2005 and *In re Sinclair's Suncoast Seafood, Incorporated*, 140 B.R. 588, a bankruptcy decision from the Middle District of Florida in 1992.

As an initial observation it is difficult to quarrel with any test that's based on the best interests of the bankruptcy estate. That test, however, in my view, begs the question, because it does not address who gets to determine what is in the best interests of the estate and, more specifically, the degree to which, if any, the Court should defer to the trustee's judgment regarding the decision to object to the proof of claim and the timing of the filing of that objection.

Notwithstanding, the lack of a fully-developed analytic structure in cases such as *Trusted Media* and *Sinclair's Suncoast Seafood*, I can't envision a system in which the Bankruptcy Court could review a trustee's decision regarding the administration of potential claims objections on something less deferential than an abuse of discretion standard as stated in

Morrison.

And I understand Ayzenberg's argument to be just that, that a plenary standard of review, perhaps akin to that employed by an Appellate Court reviewing a lower court's ruling on issues of law is appropriate here.

This argument would be based on, in large part, on the fact that on its face the Code does not delegate exclusive claims objection authority to the trustee, as it does other certain obligations and rights of the trustee in the bankruptcy process.

As explained below, however, for purposes of resolving the questions before me today I need not to define with precision the standard with which I must review the trustee's judgment in this case, at least not yet.

Suffice it to say that because I conclude that *Fred Rueping* remains good law in deciding whether to admit – to permit a creditor to file an objection to a claim over the trustee's objection, a trustee's decision to defer or not file a claims objection at all is entitled, at a minimum, to at least some deference.

Whether the standard is abuse of discretion or some intermediate standard, such as some deference, I need not decide today.

Let me now apply these general principles to the matter in hand. I begin the discussion with a tautological

principle: Only allowed claims should be paid in a bankruptcy distribution. But the trustee's decision whether to prosecute objections and the timing of the filing of those objections involves a business judgment.

The trustee must consider, among other things, the merits of the claim, any potential objection to the claim, the expense of prosecuting a claims objection, the certainty or uncertainty that there will be an estate available for distribution to creditors, the probable size of the estate, the likely effect a successful distribution would have on the level of distribution to creditors.

Sometimes, however, the potential claims objection and the litigation designed to raise the bankruptcy estate are sufficiently interrelated as to raise a real question whether it is in the best interests of the bankruptcy estate to defer the litigation of one or more claims objections until after resolution of asset collection litigation. As someone stated during the hearing, it may be in some cases a proverbial chicken-and-egg problem.

That brings us to what may be the heart of the dispute in this case. Ayzenberg asserts that it is far more sensible to ascertain the size of the bankruptcy estate before or at least at the same time as the parties delve equally into the trustee's fraudulent-transfer action.

And, therefore, it is in the best interests of the

bankruptcy estate, according to Ayzenberg, that the claims resolution process be accelerated not deferred. And since the trustee is unwilling at this time to take on that task of accelerating the claims allowance process, she is volunteering to do it.

Ayzenberg reasons that the Mogilyansky and Reinhart claim are invalid, the effect being that the unsecured claims against the estate are only $144,000, not in excess of 6.7 million.

If Ayzenberg is correct, the wisdom of pursuing the large complicated fraudulent-transfer action undertaken by the trustee is drawn into question. Also, if she is correct, the successful prosecution of the objections makes it more likely that the fraudulent-transfer action could be settled, because the estate's amounts for a substantial distribution will be reduced and the legal expenses going forward can be minimized.

Ayzenberg's willingness to take on the claims objection task is hardly altruistic. She and other members are the defendants in the trustee's fraudulent-transfer action. She is a creditor in the case only because she purchased a very small claim in the bankruptcy case.

Since no explain – explanation – business-type explanation has been given for the purchase of that claim, it is fair to assume that she did so for the purpose of obtaining standing – not in a – in the true sense of the word, "standing,"

but standing for these purposes to object to the Mogilyansky and Reinhart claims.

I infer that her basic strategy is as follows: If she can eliminate the Mogilyansky and Reinhart claims completely, she reduces the amount that the trustee needs to collect to pay creditors. She may therefore reduce her exposure in the fraudulent-transfer action, as well, by reaching – by reducing the reach-back period in the state law provisions upon which the transfer – certain transfer avoidance claims of the trustee are based. As I said, this reduces her exposure and the exposure of her codefendants who are members of her family.

Also, as suggested earlier, even if the two creditor claims are not disallowed in their entirety, a significant reduction in the claims could cause the trustee to modify her business judgment and lower her settlement demands in the fraudulent-transfer action.

But pointing out Ayzenberg's self-interest in all of this does not disqualify her from prosecuting an objection. The entire bankruptcy system is based on the premise that parties will act in their own self-interests. This reality even applies to some extent to the trustee who, although the trustee is a fiduciary, is paid by commission and who is sometimes referred in the literature metaphorically as a shark that eats what it kills.

On the issue here, Ayzenberg's motivation, depicted as

a negative quality by the trustee, actually is a double-edged sword. Ayzenberg has a strong incentive to vigorously prosecute the claims objections. That at least satisfies a threshold requirement in considering the propriety of authorizing her to prosecute the claims objection at issue.

That is, separate and apart from her interest in augmenting her distribution on her paltry $4,000 claim, the potential impact of the fraudulent-transfer action — the potential impact of the claims objection on the fraudulent-transfer action gives her a large incentive to attack the Mogilyansky and Reinhart claims.

Ayzenberg might even go so far as to suggest that her status as claims objector is superior to that of the trustee. In light of the fact that a successful claims objection might impact the potential reach-back period in the fraudulent-transfer action, Ayzenberg suggests the trustee lacks the full incentive to prosecute the claims objection.

The trustee, on the other hand, prefers what might be characterized as the conventional Chapter 7 case administration approach. First, raise an estate, then address claims allowance and distribution.

The trustee reasons that if the fraudulent-transfer action is not successful and there are no estate funds to distribute there is no point in expending the parties' or the Court's resources litigating the validity of the Mogilyansky and

Reinhart claims.

To recapitulate, Ayzenberg perceives the trustee and her professionals as turning a molehill into a mountain by pursuing what she asserts are invalid claims against her family and herself without first testing the validity of the two claims that comprise approximately 98 percent of the filed claims in this case.

In less charitable moments, Ayzenberg even suggests that the trustee's real motivation is to maximize your commission and the professional compensation of her attorneys.

The trustee, on the other hand, perceives the debtor as having participated in a massive series of fraudulent transfers and sees Ayzenberg as an active participant in those fraudulent schemes and therefore looks askance at Ayzenberg's attempt to insinuate herself into case administration for the ultimate purpose of undermining the trustee's fraudulent-transfer action.

I do see these two diametrically-opposed positions regarding the appropriate manner in which this bankruptcy case should be managed as internally consistent and logical as they are different.

To resolve the issue as to the appropriate manner in which this case should be administered requires returning to the legal framework discussed earlier under *Fred Rueping*.

The issue is this: Has Ayzenberg made a sufficient

showing for the Court to override the trustee's decision to defer the initiation of claims objection litigation against Mogilyansky and Reinhart.

For two reasons, I conclude that Ayzenberg has not made that showing:

First, I am satisfied that given the trustee's presumptively exclusive responsibility to review proofs of claim and, when appropriate, file objections, the trustee should be given an opportunity to complete her investigation regarding the merits of the two claims before the Court intercedes to authorize creditor-filed objections.

The trustee testified during the hearing on the debtor's motion to voluntarily dismiss the case and made an offer of proof on the current motion that was accepted as part of the record during the hearing.

And I took her testimony to be that she had reviewed the Mogilyansky and Reinhart claims in a preliminary fashion and concluded that they appeared mostly valid. And that while she seemed inclined to defer the initiation of claims objections until after she has achieved some success in the fraudulent-transfer action, she remained amenable to further evaluating the merits of the claim and possibly initiating claims objections sooner rather than later based on additional information that might be brought to her attention.

In that regard, the trustee made a record that she

offered to meet with Ayzenberg professionals as part of her investigation of the substance and merits of the potential objections that Ayzenberg wishes to press and that Ayzenberg representatives had failed to avail themselves of the opportunity to meet with the trustee and convince her to promptly prosecute the claims objections.

In these circumstances, I accept the trustee's implicit argument that her authority as the representative of the bankruptcy estate to decide if and when to file claims objections should not be displaced in favor of a creditor who did not cooperate in her investigation of the very claims that the creditor seeks authority to challenge.

A second consideration that contributes to my decision is the fact that the competing proceedings, that is the fraudulent-transfer action and the claims objection, on their face both appear to be relatively complex and time-consuming.

Available in the court record for my review are the proofs of claim and the objections. My review of this material suggests that those proceedings involve multiple factual and legal issues, are not simple, and potentially will generate considerable litigation.

This dynamic cuts against permitting Ayzenberg's claims objection to proceed against the trustee's wishes at this time. There is reason for the trustee to be reluctant to undertake time-consuming claims allowance litigation when there

is no certainty that there will be an estate for distribution.

I recognize, of course, that the same can be said about the fraudulent-transfer action, if that litigation were given primacy. Why undertake a complex fraudulent-transfer action if it will result in the creation of an estate far in excess of the amount of the ultimately-allowed — allowable claims.

The real difficulty here is that in this case the best interests of the estate ends up on the respective merits of the claims objections, as well as the fraudulent-transfer action. And the merits are not knowable at this time to this Court.

As a result, whatever the standard may be by which I review the trustee's judgment on the issue, I have an insufficient record to draw the conclusion that the trustee's decision to defer the initiation of claims objection is sufficiently flawed as to warrant the authorization of claims objection litigation by a creditor over her objection.

Accordingly, I will grant Mogilyansky's motion without prejudice to Ayzenberg's right to refile in the future her objections to the Mogilyansky and Reinhart proofs of claim.

I point out that in making this decision I have consciously attempted to fashion as narrow a ruling as possible. I recognize that I have not given the parties guidance on a number of questions, such as how much time should the trustee continue to have to investigate the propriety of filing

objections.

If the trustee completes her investigation and concludes that objections to the two claims are warranted, but nonetheless chooses to defer filing them in favor of prosecuting the fraudulent-transfer action may Ayzenberg then press her claims objections?

If the parties agree that the – that objections to the claims are warranted and the trustee wishes to defer those objections, what type of evidentiary record must Ayzenberg make to convince the Court to override the trustee 's judgment regarding the timing of the filing of the objection? What is the standard of review the Court will employ in reviewing that judgment?

I have not answered those questions today, because they are abstract questions forming at this time and would result in the issuance of an advisory opinion. Perhaps down the road it will be presented and it will be necessary to decide then. And, if so, I will do so at that time.

Finally, before concluding this bench decision I address the debtor's right to press objections to the Mogilyansky and Reinhart claims. Most but not all of the legal principles discussed earlier applies to the debtor. Although a debtor is a party-in-interest for most purposes, courts have held that generally a Chapter 7 debtor is not a party-in-interest and has no stake in the outcome of claims

litigation and ultimately the distribution of estate assets, if the estate assets do not exceed the allowed claims.

In other words, if the outcome of the claims objection will not create or increase a surplus in the estate and result in or increase distribution of estate property back to the debtor, then the debtor lacks authority to object to a proof of claim.

There are many cases that stand for this proposition. I will cite one, *Willemain versus Kivitz*, 764 F.2d 1019, a Fourth Circuit case from 1985.

Here I accepted that as argument that there is a sufficient potential for a solvent bankruptcy estate to be created as to warrant a recognition of the debtor's right to object to the Mogilyansky and Reinhart claims. That result is the logical extension of the trustee position.

If the fraudulent-transfer action is put first and the trustee succeeds in that action the estate may exceed the amount of the allowed claims, particularly if Mogilyansky – if the Mogilyansky and Reinhart claims are disallowed in any substantial amount.

I'll put aside for a moment the issue of whether in the context of a fraudulent-transfer action it's appropriate and if the theory of the fraudulent transfer is that it was an intentional fraudulent transfer whether returning excess funds to the debtor is appropriate. For purposes of the decision

today, I will assume that it may be appropriate.

As a result, there may be a difference between the debtor's status and Ayzenberg's status when it comes to the filing of objections to proofs of claim.

Ayzenberg's right to file a claims objection against the trustees wishes requires that she convince the Court that the trustee's judgment be overridden, because the trustee, in effect, is a representative of Ayzenberg's interest in the bankruptcy case.

The debtor's interest is a distinct interest. It's a personal interest. And the debtor's right to object does not require that she override the trustee's judgment in that regard, provided that there is a reasonable — there was a reasonable prospect of a surplus in the estate.

Consequently, this isolates what I had previously called the timing issue. Should the debtor be permitted to press the objections now? I think not. The logic of the debtor's position is that a surplus need be created precisely because the fraudulent-transfer action may be litigated to a successful result before claims allowance litigation reduces the claims against the estate below the amount of money retrieved by the trustee.

The argument that there is a reasonable likelihood that a surplus estate will be created is what gives the debtor the authority to object to the claims in the first place.

So I will not permit the debtor to have it both ways. That is, to have authority to object because there may be a surplus estate created and then attempt to litigate the proofs of the claim first which would eliminate the likelihood that a surplus would be created.

Such an outcome would permit the debtor to employ his status to object to proofs of claim to undermine the potential that a surplus will be created. The position the debtor takes makes it obvious and understandable, given that the spouse of Ms. Ayzenberg and the other defendants in the fraudulent-transfer action are members of his family, that the debtor's purpose in pressing the claims objection is not to assist in creating a surplus estate but rather to obstruct the fraudulent-transfer action, a lawsuit in which he is alleged to have committed intentional fraudulent transfers.

Therefore, notwithstanding my conclusion that the debtor has authority to object to the Mogilyansky and Reinhart claims, I conclude that the trustee's judgment deferring a prosecution of any claims objection should prevail for the time being, at least, over the debtor's right to press objections, unless the debtor can make the same type of showing as Ayzenberg for overriding the trustee's judgment.

For the reasons expressed earlier, neither Ayzenberg nor the debtor has made a sufficient showing on the issue at this time.

Therefore, insofar as the debtor has objected to the Mogilyansky and Reinhart claims through his joinder of Ayzenberg objections I will dismiss those objections without prejudice.

That concludes my ruling. Is there any outstanding issues in this matter that parties believe I have left out that I need to address?

MR. BOVARNICK: No, sir.

MR. BRESSLER: No, Your Honor.

THE COURT: Right. I hear no, no answer to that.

I will issue an appropriate order to carry out the — carry out this decision.

Anything else we should discuss while we are all here?

MR. BRESSLER: Your Honor, there is —

THE COURT: You need to sit down and use the microphone so they could hear you.

MR. BRESSLER: I'm sorry. I apologize. I'm used to standing up to address the Court.

THE COURT: Everybody is.

MR. BRESSLER: There is a separate motion listed today for the full testament or alternative service as to three defendants in the adversary action.

THE COURT: All right. While I'm looking through the papers, do you want to just describe how service was effected?

MR. BRESSLER: Service was effected by First Class mail at the address we were supposed to be able to ascertain the

three defendants, two from the Pennsylvania Corporations Bureau. One, we could not find anything from the Pennsylvania Corporations Bureau, but there is testimony of Mr. — of the debtor that he has been the officer and involved with the one company. And, therefore, we attempted to make service at his last known address.

We also showed him the motion and other efforts we've made to locate these defendants, including attempting personal service on at least one of them and their relationship to other parties who are in the case so that — it could hardly be said that the defendants wouldn't be aware of what's going on.

Marina Reinsurance, there's been testimony of Mr. — of the debtor's involvement with Marina Reinsurance.

The Fox Lake Company, there's been some testimony of the debtor's former involvement at least. And he is the last person we know that was involved with that company.

The third company, there's been testimony of — there's been an indication that Lena Polnet, I believe, has been involved with that company.

So that there are defendants in this case involved with these three entities that have filed responses. Generally what happened is we got back many, many envelopes marked, "Refused," returned, no address.

Even now as to a number of defendants that filed answers, so that the — the envelopes were not being accepted.

We have, because this is a complicated case and we've never seen that has happened, we have offered an alternative, Your Honor, if Your Honor feels it's appropriate, that we give publication notice to ensure that these defendants are noticed before we take the fall, even though we believe that these defendants are already on notice based on the fact that parties related to them are on notice.

THE COURT: Um-hum.

MR. BRESSLER: And we also showed that we did send letters to both Mr. Giacometti and Mr. Goldin, asking them if their clients could provide any information.

Mr. Giacometti responded that his client would not be providing any information.

Mr. Goldin has never responded as to these three entities.

THE COURT: I noticed in your form of order you won a judgment for an accounting. Is that of any real practical consequence if the defendants are not participating in the case?

MR. BRESSLER: Well, if we can at some point locate the defendants or if they don't provide the account — accounting, there could be an issue of then ordering an officer or somebody else involved with the companies who are defendants to cause that accounting to occur. So I think it may have some weight, although I recognize at this point I don't know how significant it will be.

THE COURT: Okay. Does anyone else wish to be heard on this?

MR. GIACOMETTI: Your Honor, Harry Giacometti. I couldn't hear Gary clearly on all his points. But I guess, with respect to the debtor and the fact that the debtor may have an interest in these companies that they're seeking a default against, I would – to your point that – as the preclusive effect of the entry of the default and the judgment that would require an accounting, I would just – I guess our position would be that a default just precludes these defendants from asserting a defense in this case.

THE COURT: Well, the order goes further. The order directs them to provide an accounting. Now whether the trustee seeks to enforce that is up to the trustee.

But I suppose what I hear Mr. Bressler saying is that if he finds a responsible party connected to one of those entities, he's reserving the right to seek to compel the responsible party to comply with the order. It may have some consequence down the road.

That's how I understand – what I understand him to be saying. So does that lead you to take issue with anything in the motion?

MR. GIACOMETTI: I think I would, to the extent that – that – well, Your Honor, I think I would. And what I'd like to do is discuss it with my client to see whether, as a result of

that, that there would be some interest in my client –

THE COURT: Well, why do you need more time? The motion has been pending – was served a while ago. Why would you first need to discuss that? And why would – and what – give me some type of a *prima facie* argument as to why, assuming service was valid, I shouldn't order that relief?

MR. GIACOMETTI: Your Honor, I just don't know whether service was valid. I don't know what my client's position on the issue would be.

MR. GOLDIN: Your Honor, may I be heard? This is Ely Golden.

THE COURT: Yes.

MR. GOLDIN: I do bring to the Court's attention that we, in a motion to dismiss, which challenges – they complain of a number of issues, we argue that the trustee has no, quote, right of accounting, that the trustee can certainly take discovery and obtain evidence and do other things that are proper under the Rules.

But the concept of an accounting in its classic form, as I understand it under state law, is not something the trustee is powered with. So as to the issue the accounting, I would simply ask that the Court or suggest, respectfully, that the Court perhaps defer ruling on the accounting question until the motion to dismiss has been adjudicated.

If the trustee wants a default judgment for failure to

answer the complaint and service has been properly made if the Court – in the Court's determination, I think the Court can enter whatever judgment it thinks is appropriate.

But in terms of that relief, which is not the traditional or orthodox relief that you would see in a Rule 55 motion, I would have the Court wait until the dispositive motion has been ruled upon.

THE COURT: Mr. Bressler?

MR. BRESSLER: Your Honor, Mr. Goldin represents one party, for example, for example, Ms. Polnet, who we alleged is involved with the one company. In fact, in a motion to dismiss they talk about this company and the claims against them, although no response was filed on behalf of them.

If – if these principals of these companies, to the extent they're principals, had a problem with the accounting, there was nothing to prevent these companies from filing an answer. They made a tactical decision not to respond –

THE COURT: Well, let me take his comment, put it in a slightly different light. Let's think of him more as a friend of the Court, in that what I hear him saying is that there are situations which a court will not grant a default judgment if the relief is not authorized by law.

And he's pointing out that I have a motion pending in front of me where that very argument is being made. You may be right in a technical sense. You might not have –

misunderstanding to ask me not to do something as to a party he doesn't represent, but he's just pointing something out to me.

And since it is a matter of discretion, I turn back to you, your comments on the merits, is that something – that's sensible to do if I had that issue before me. And if I were to conclude that there is no right to an accounting, would it be appropriate for me to grant the accounting even against a nonresponding defendant?

And I'll firm one other factor. If your comments earlier, if I understood your comments earlier correctly, the trustee has no present intention of acting in the immediate future on the accounting relief, anyway. So what harm is there to the trustee to defer that issue?

MR. BRESSLER: Well, I – I'm trying to balance the fairness of the situation. And to me if they want to come in and object to the accounting, then they should have come in on behalf of that entity. We don't know if a year from now –

THE COURT: They – they did object to the accounting on behalf of the entities they represented.

MR. BRESSLER: Correct. And not only just these entities. And we don't know whether a year from now they're going to come in and somehow argue that the default judgment was invalid and they never – because they never entered an appearance on behalf of –

THE COURT: Not – they'd have to come in on behalf of

the party against whom the default was entered, right?

MR. BRESSLER: Right.

THE COURT: He's not making that argument.

Here's what I'm going to do —

MR. BRESSLER: But I understand their argument, and I understand why the Court would be reluctant. While we don't concede the right on the accounting point, the Court may feel it would be inconsistent if the Court ruled on the motion to dismiss for the accounting, for everybody else denying it, and entered an accounting as to these three entities.

THE COURT: And did you —

MR. BRESSLER: And I — I do understand the issue.

THE COURT: And I will freely confess, I haven't studied the issue yet in enough detail to know the answer or what my answer will be, at least.

MR. BRESSLER: We haven't had the response yet to win that, so — I understand that, as well.

THE COURT: I mean just look at the motion to dismiss, and I do recall that issue being in there.

Well, here's what I'm going to do. I will make another confession. I did not give this motion a lot of attention before today, concentrating primarily on the other motion. I will review it again in chambers. I'm satisfied that there's service.

At a minimum I will grant to the default judgment on

liability. My inclination right now is to defer the accounting relief. If I have some further problem with service, I'll either go to the alternative plan, alternate relief that you seek or, if need be, I'll bring you back for another hearing. So those are the options. But I do want to just take a closer look at this in chambers.

MR. BRESSLER: Thank you, Your Honor.

THE COURT: All right. And I think that's the last matter we need to address today. So thank you all.

MR. GOLDIN: Thank you, Your Honor.

(The hearing was adjourned at 10:52 o'clock a.m.)

—oOo—

State of California)
) SS.
County of San Joaquin)

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Eastern District of Pennsylvania, Clerk of the Court, of the proceedings taken on the date and time previously stated in the above matter.

I further certify that I am not a party to nor in any way interested in the outcome of this matter.

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Susan Palmer
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Dated May 16, 2010